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No. 912

IN THE

Supreme Court of the United States

October Term, 1961

PAWNEE INDIAN TRIBE OF OKLAHOMA, consisting of the four confederated bands of Pawnee Indians, namely Chaui or Grand Pawnee, Kitkehahki or Republican Pawnee, Pitahauerat or Tappage Pawnee and Skidi, Loup or Wolf Pawnee

Petitioner

VERSUS

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PAWNEE INDIAN TRIBE OF OKLAHOMA, consisting of the four confederated bands of Pawnee Indians, namely Chaui or Grand Pawnee, Kitkehahki or Republican Pawnee, Pitahauerat or Tappage Pawnee and Skidi, Loup or Wolf Pawnee

Petitioner

VERSUS

THE UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Pawnee Indian Tribe of Oklahoma, petitioner, above named, petitions for a writ of certiorari to review the judgment of the United States Court of Claims.

OPINIONS BELOW

The opinions of the Indian Claims Commission appear at 8 *Ind. Cl. Comm.* 718 (Separate App. p. 128), 9 *Ind. Cl. Comm.* 85 (Sep. App. p. 176) and 9 *Ind. Cl. Comm.* 94 (Sep. App. p.

194). Findings of Fact of the Indian Claims Commission material to this petition are set forth in *8 Ind. Cl. Comm. 648* (Sep. App. p. 51), and *9 Ind. Cl. Comm. 82* (Sep. App. p. 172). Nine copies of the Indian Claims Commission's Opinions and Findings, together with Interlocutory Orders, Conclusions of Law and Final Award which were printed for the use of the court below as a part of the brief of petitioner therein are filed herewith pursuant to Rule 23 1(i), as a separate appendix. The opinion of the Court of Claims, Appeal No. 7-61, April 4, 1962, is not yet reported but appears in the appendix attached to this petition, page 15.

Earlier opinions not involving the issues of the present petition are not reproduced in the appendix, but appear in *1 Ind. Cl. Comm. 230*, reversed *124 C. Cls. 324*, 109 F. Supp. 860; *5 Ind. Cl. Comm. 224, 268*, and *7 Ind. Cl. Comm. 721*.

JURISDICTION

The judgment of the Court of Claims was entered April 4, 1962 (App. p. 15). The jurisdiction of this Court is invoked under 28 U.S.C. § 1255; and see § 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. § 70s.

QUESTIONS PRESENTED

I.

Under clause (3) of Section 2 of the Indian Claims Commission Act, covering claims based upon Indian Tribal land

cessions made for an unconscionable consideration, should the government's promise to make payments in the future be valued as of the same date as the valuation of the lands conveyed by the Indians?

II.

Where there was no open market as of dates of cession for Indian Tribal lands should the fair market value of the lands at cession dates be discounted for the time they remained unsold in the hands of the government awaiting government surveys?

III.

If, as the Indian Claims Commission found, approved by the Court of Claims, there was no open market for the lands involved at cession dates and there were no comparable sales of similar lands in the same general area about the same time from which a fair market value might be imputed, should the statutory sale price of public lands be adopted as the value as directed by this Court in *New York Indians v. United States*, 170 U.S. 1?

STATUTE INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, chapter 959, 60 Stat. 1049, 1050 (25 U.S.C. § 70a) provides as follows:

> "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Con-

stitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission." * * *

STATEMENT

Petitioner has claimed that consideration paid by the government for a tribal land cession under a treaty was unconscionable (*Ind. Cl. Comm. Act*, § 2 (3), supra). Under the treaty the consideration payable by the government consisted in part of future installments of money, goods or services payable for a long period after the treaty date. The Indian Claims Commission, following the rule of the earlier decisions of the Court of Claims in *Miami Tribe of Oklahoma v. United States*, 175 F. Supp., 926, 956; *Absentee Shaunee Tribe of Oklahoma v. United States*, Appeal No. 9-59, C. Cls. (decided November 2, 1960), *cert. denied*, 366 U.S. 924; *Miami Tribe of Oklahoma v. United States*, Appeal No. 2-59, C. Cls. (decided July 15, 1960). C. Cls.

281 F. 2d 202, *cert. denied*, 366 U.S. 924; and *Crow Tribe of Indians v. United States*, Appeal No. 1-59, C. Cls. (decided November 2, 1960), C. Cls. , 284 F. 2d 361, *cert. denied*, 366 U.S. 924, valued the consideration payable for the land as of the date when the cession was made, instead of the aggregate of all future installments even though some were payable long after the treaty date. The Court of Claims reversed, holding that its earlier decisions were in error since essentially equivalent to the allowance of interest against the United States absent a contract or statute providing for interest. It gave no attention to the comparison of values on the day the treaty became effective between the parties, and as a result found that much more should be credited to the government for payments it made than had it valued those payments as of the time of the transaction to compare them with the value of the lands at that time. Even so, the consideration paid by the government was so small as to be unconscionable and some judgment results for petitioner, though substantially less than what petitioner urges is required.

In affirming the Commission's findings as to valuation of lands herein the Court of Claims stated that those valuations were amply supported by substantial evidence without discussion of petitioners contention that the methods of evaluation are erroneous.

In more detail the facts are as follows: Petitioner ceded some 23,067,219 acres of land situated in south central Nebraska and north central Kansas by treaties of October 9, 1833, 7 Stat.

448; June 5 and 17, 1848, 9 Stat. 853; September 24, 1857, 11 Stat. 729; and March 3, 1875, 18 Stat. 420.

By the treaty of 1833 the Indian Claims Commission found petitioner had ceded lands worth $4,575,900 for a consideration paid over the years and amounting to $148,200 (Sep. App. p. 86, Fdg. 87). This determination was made prior to the Court of Claims rulings in *Crow Tribe of Indians v. United States*, 284 F. 2d 361 (1960 *cert. denied*), 366 U.S. 924, *Miami Tribe of Oklahoma v. United States*, 281 F. 2d 202 (1960), *cert. denied*, 366 U.S. 924. Therefore, the Commission at first failed to value the consideration as of the same date, October 9, 1833, as of which the lands were valued. Nevertheless, what was paid amounted to only about 3 per cent of the value and was obviously so grossly inadequate as to render the consideration unconscionable.

Under the treaty of August 6, 1848, the Commission found that lands valued at $99,380 at the time of cession were paid for with only $2,000 in goods and merchandise which was unconscionable. (Sep. App. p. 94, Fdg. 108)

Under the treaty of September 24, 1857, the Commission found that lands worth on that date $4,939,000 had been ceded for a total consideration of $2,144,609.90, which was unconscionable. (Sep. App. p. 118, Fdg. 140)

Under the treaty of March 3, 1875, the Commission found that lands having a value on that date of $12,000 were ceded for a payment of $6,000, which was unconscionable. (Sep. App. p. 124, Fdg. 159)

The Court of Claims in the meantime having decided in the *Crow* case, supra, the *Shawnee* case, supra, and *Miami* cases, supra, that the value of the consideration, that is, the promise of the government to make future payments — must be valued as of the same date the lands were valued, which can be calculated as the present value of future payments using a 5 per cent simple interest computation, the Indian Claims Commission upon motion amended its earlier findings of fact with the result summarized as follows (See App. pp. 187, 188, 191):

	Total Paid	*Value of the Promise to Pay*
Treaty of 1833	$148,200.00	$115,095.73
Treaty of 1857, Art. 2 Annuity	200,000.00	117,560.27
Treaty of 1857, Originally $2,144,609.90, Corrected to	1,344,281.20	568,235.54

As a result the recovery by petitioner was increased $831,589.66.

As to the perpetual annuity established by the treaty of 1857 in the amount of $30,000 per annum, the Commission held that this should be commuted at 5 per cent and treated as though the United States had actually paid the $600,000 required to maintain the annuity even though the principal has not been paid and stated that if Congress terminated the annuity its commuted value of $600,000 should be paid petitioner. (Sep. App. p. 196).

After deduction of offsets provided for by the Indian Claims Commission Act, a final award to petitioner was entered by the

Indian Claims Commission in the amount of $8,147,575.36 (Sep. App. p. 201).

So far as is material to this petition, the Court of Claims reversed on the issue of present value of consideration, except for the value of the perpetual annuity which it held could be treated as a constructive payment by the United States to itself as trustee for the tribe in perpetuity. It took no note of the fact that the other discounted payments might also be treated as similar constructive payment, but likened the valuing of the government's promise to pay in exchange for lands to the allowance of interest against the government. (App. p. 17).

REASONS FOR GRANTING THE WRIT

1. The court below is the only court in which this issue can be raised; the conflict with that court's earlier determinations should be treated as the equivalent of a conflict between circuits.

A year ago this Court denied petitions for writs of certiorari filed by respondents raising this identical issue. *United States v. Miami Tribe of Oklahoma*, No. 861 O.T. 1960; *United States v. Crow Tribe*, No. 862 O.T. 1960; and *United States v. Absentee Shaunee Tribe of Oklahoma*, No. 863 O.T. 1960. In the *Crow* case, 284 F. 2d 361, the court below had flatly ruled that "the consideration which the Indians received, like the lands which they surrendered, must be valued as of the date of the treaty;" and it sharply distinguished the situation in which interest cannot be awarded against the United States in the absence of

express statutory payment, pointing out that "We do not in this case award one cent of interest to the Indians . . . The Indians are not being paid for the use of their money". Accordingly, it valued the promise of the government to pay, which the Indians received at the date of the treaty, the same way it valued the lands of the Indians — that is, as of the same date.

The court now reverses itself, saying that to compute the value of the government's promise by discounting the amounts ultimately received back to the date of the treaty "is tantamount to charging the United States with interest — in face of the well established rule that the United States is not liable for interest in the absence of a contractual or statutory requirement to pay interest." (App. p. 17).

The only forum in which a claim by an Indian tribe arising as a result of the payment by the United States of an unconscionably small fraction of what the lands ceded to it were worth, is the Indian Claims Commission. *Sec. 2 Ind. Cl. Comm. Act*, quoted ante p. 3. The only court to which an appeal from its determinations may be taken is the Court of Claims pursuant to § 20 of the *Indian Claims Commission Act*, 25 U.S.C. § 70s. As a result, Indian tribal litigants have no hope of ever showing a conflict of circuits envisioned by Rule 19(1) (b) of the Rules of this Court. Where the court below proceeds in flat conflict with its earlier determinations, we submit that the supervisory authority of this Court contemplated by Section 20 of the *Indian Claims Commission Act*, 25 U.S.C. § 70s, should be exercised.

That the situation here is appropriate for certiorari is shown

in the strikingly-similar case of *Compagnie Generale Transatlantique v. Elting*, 298 U.S. 217. As *Robertson & Kirkham, Jurisdiction Sup. Ct. U. S.*, say (1st ed. § 306, p. 619) —

> "Conflict or inconsistency between decisions of the same Circuit Court of Appeals ordinarily is not a ground for a writ, since the later in point of time is controlling. However, the writ was granted on the ground in Conpagnie Generale Transatlantique v. Elting, where there were the following special circumstances: The question related to the construction of a provision of the Immigration Act. Prior decisions of the Circuit Court of Appeals for the Second Circuit had established a particular construction in that circuit, in which the government had acquiesced after the Supreme Court had refused to grant a certiorari to review one of those decisions. Subsequently, in the Compagnie Generale Transatlantique Case, the Circuit Court of Appeals for the Second Circuit made a right about face on this question of construction, without mentioning or attempting to distinguish its prior decisions. The Supreme Court granted certiorari and reversed. It may be noted that the immigration question involved was one arising more often in the Second Circuit than elsewhere."

Cf. *United States v. Esnault-Pelterie*, 299 U.S. 201, from the Court of Claims where no real possibility of conflict was apparent, as litigation over the kind of patent matters as there involved, like jurisdiction to review the Indian Claims Commission, is restricted solely to the Court of Claims.

2. The Decision below Conflicts within Itself.

As to payments under the 1833 and 1857 treaties the court below has held that sums expended for goods and services over a great many years should be considered part of the value of the government's promise as of the date of the treaty without dis-

count for remoteness of the payments. At the same time, it affirmed valuing the Indians' lands at the time the government's promise was given, without the enhancement in value which would have occurred from time to time over the years had the lands been valued pro rata as payments were made so as to bring value of what the government and the Indians received into agreement as to date.

The court turned right around, but consistently with its former opinions, as to the perpetual annuity of $30,000 a year established by the treaty of 1857, and capitalized that at 5 per cent or a total value of $600,000. The Court then applied it as of the date of the treaty as a payment on the claim even though the commuted value has never been paid, contrary to the rule of *Miami Tribe of Oklahoma v. United States*, 175 F. Supp. 926, 956. The Court held that "Although not paid to the tribe, there was a constructive payment by the United States to itself, as trustee for the tribe, in perpetuity." It did not explain why the same formula was not applicable to the payments earlier considered — that is, why the United States ought not to have been considered to have made constructive payments to itself as trustee for the tribe for those future payments.

The inherent conflict within the court's opinion which results leaves the ruling of the court below so vague and uncertain that it will give no proper guidance to litigants in the hundreds of claims still pending in the Indian Claims Commission, and calls for the exercise of this Court's supervisory authority.

3. The Decision below Conflicts with other Decisions of that Court which have not been overruled and with Decision of this Court.

In *Miami Tribe of Oklahoma v. United States*, 175 F. Supp. 926, reaffirmed in *Miami Tribe of Oklahoma v. United States*, 281 F. 2d 202, which was not overruled on this point, the Court of Claims disapproved the wholesale interest discount theory of valuation of Indian lands, which theory discounted fair market value at cession dates at the then going interest rates for the time the lands remained unsold in the hands of the government. In the instant case, by approving findings of the Indian Claims Commission, the Court of Claims has approved the wholesale interest discount theory of valuation adopted by the Indian Claims Commission herein. (Finding No. 69, sep. app. p. 61); (Finding No. 75, sep. app. p. 77); Finding No. 79, sep. app. p. 83); (Finding No. 98, sep. app. p. 90; (Finding No. 106, sep. app. p. 94); (Finding No. 124, sep. app. p. 104); and (Finding No. 132, sep. app. p. 10, contrary to the rule of its former decisions.

The Court of Claims herein has departed from the rule of its former decision in *Miami Tribe of Oklahoma v. United States*, 175 F. Supp. 926, and from the decision of this Court in *New York Indians v. United States*, 170 U.S. 1, by failing to apply the statutory sale price for public lands as value at cession dates when there were no comparable sales of similar lands in the same general area about the same time.

The resulting conflict between the present decision and the

former decisions of the Court of Claims in the first *Miami* case, supra, which has not been overruled, and the rule of the *New York Indians* case, supra, of this Court, makes for great ambiguity and uncertainty in the determination of subsequent Indian claims.

4. The question is important.

We realize that the importance of the question, urged by the Solicitor General, was not regarded as sufficient by this Court to call for an exercise of certiorari jurisdiction in the three previous cases from the Court of Claims; certiorari was denied. Nevertheless, we submit that taken in conjunction with the reasons for granting the writ heretofore discussed, the Court may properly take into account the considerations urged by respondent in those cases a bare year ago. Since then the court below has confused issues on which literally hundreds of claims were being processed.

We quote the Solicitor General in the petition for writ of certiorari in *United States v. Miami Tribe of Oklahoma*, O.T. 1960, No. 861, in part as follows:

> "3. The question is important. The novel rule declared by the court below embraces almost every claim now pending under the Indian Claims Commission Act; at least some portion of the payment made by the government in the past was paid in installments in the case of almost all claims.[3] In addition, as indicated above, the recurring problem of offsets may well be affected.

[3] At the end of the fiscal year 1960, there were 463 cases pending before the Commission, the amount claimed being impossible to estimate. However, in that fiscal year, final judgment in 12 cases totalled $37,300.00." (The footnote is quoted from respondent's petition.)

"The future effect of this ruling is also significant. The Court of Claims, under 28 U.S.C. 1505, has been vested with permanent jurisdiction as to Indian claims, without the broad authority given the Indian Claims Commission. The present ruling could be asserted to apply in claims submitted to that court and to counter-claims and set offs in such cases. 28 U.S.C. 2508."

CONCLUSION

The writ should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. Appeal 7-61

(Decided April 4, 1962)

PAWNEE INDIAN TRIBE OF OKLAHOMA, consisting of the four confederated bands of Pawnee Indians, namely: Chaui or Grand Pawnee, Kitkehahki or Republican Pawnee, Pitahauerat or Tappage Pawnee, and Skidi, Loup or Wolfe Pawnee, v. THE UNITED STATES

John Wheeler, Jr., for plaintiff. *Arthur B. Honnold, John M. Wheeler*, and *Robert L. Wheeler* were on the briefs.

Ralph A. Barney, with whom was *Assistant Attorney General Ramsey Clark*, for defendant.

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before the court on appeal from the Indian Claims Commission.

The issues presented are the proper valuation of the lands on the dates they were ceded to the United States and the credits to which the United States is entitled.

The lands are located in Kansas and Nebraska. On October 9, 1833, the Tribe ceded to the United States by treaty 13,074,000 acres; on August 6, 1848, 110,419 acres; on September 24, 1857, 9,878,000 acres; and on March 3, 1875, 4,800 acres. The lands ceded on October 9, 1833, were valued by the Indian Claims Commission at 35 cents an acre, the lands ceded on August 6, 1848, at 90 cents an acre; the lands ceded on September 24, 1857, at 50 cents an acre, and the lands ceded on March 3, 1875, at $2.50 an acre.

Both parties except to these valuations. We have carefully considered the findings and opinions of the Commission and the briefs and oral argument of the parties. The Commission has carefully reviewed the evidence in well considered opinions and we are fully satisfied that the valuations arrived at by it are amply supported by substantial evidence.

The next question is the credits to which the United States is entitled.

Plaintiff says that the United States is entitled to a credit only for those payments that were absolutely required by the treaties, but not to those which were made pursuant to the exercise of the discretion reposed in the President by the treaties to pay such additional amounts as he thought best. Plaintiff does not give any reasons why it thinks defendant is not entitled to credit for these amounts, and we can think of none.

The Commission has held that the defendant is entitled to credit for only the cash value of the amounts paid as of the treaty dates. Is this correct?

The total amount paid under the Treaty of 1833 was $148,200. This was not all paid at one time, but over a period of years. The Commission commuted this to a cash value at the date of the treaty of $115,095.73, and gave defendant credit for this amount. The Commission said this was the sum which, if invested at 5 percent interest, would have amounted, with interest, to the aggregate of the amounts paid on the dates they were paid. The aggregate amount paid was $148,200. Defendant was credited with $115,095.73. Both plaintiff and defendant contest this action.

Also, defendant paid, under the 1857 treaty, the total sum of $200,000 in discharge of its obligation to pay the tribe an annuity of $40,000 a year for five years. This was commuted to a cash value as of the date of the treaty of $117,560.27, and defendant was given credit for this amount.

Again, defendant paid in yearly installments a total of $1,664,131.68, in addition to the annuity payments, of which the Commission allowed $1,344,281.20. This latter amount was commuted to a cash value as of the date of the treaty of $568,235.54.

The commutation of these amounts to a cash value as of the date of the treaty was required by our decisions in *Miami Tribe of Oklahoma v. United States*, Appeal No. 2-59, decided July 15, 1960, *cert.* denied 366 U.S. 924, and *Crow Tribe of Indians v. United States*, Appeal No. 1-59, decided November 2, 1960, *cert.* denied 366 U.S. 924; but, on reconsideration, we have come to the conclusion that our decisions in those cases were in error.

Ordinarily, when a purchaser desires to defer part of the purchase price, he agrees to pay interest on the deferred payments, but here there was no such agreement. What the Commission has done in this case, and what we did in the cases referred to, was to credit the United States with a sum which, if put at interest at 5 percent, would have amounted, with interest, to the aggregate of the deferred payments. Defendant was credited with a sum less than it had paid, because it was assumed that, if this sum had been paid in cash and invested, it would have earned enough at 5 percent for the aggregate to equal the amount of the deferred payments.

It now seems evident to us that this is tantamount to charging the United States with interest — in face of the well established rule that the United States is not liable for interest, in the absence of a contractual or statutory requirement to pay interest.

Had the defendant paid interest on the deferred payments, it would have been credited with the full amount of the payment on the principal. Since it did not pay interest on them, the amount paid is reduced to an amount which, if paid in cash and invested at 5 percent, would have amounted to the aggregate of the amount of the deferred payments.

We are of opinion that defendant is entitled to credit for the full amount paid, although paid over a period of years.

In *Cherokee Nation v. United States*, 270 U.S. 476, 490, the Supreme Court said:

> When we consider the rule requiring an express provision of contract or statute to justify the imposition of interest in adjudicating any claim against the United States, we can find nothing in the circumstances of this case to increase the interest as adjudged. The additional interest now claimed is sought really as damages for the delay of Congress in appropriating the sum due in 1895 as the United States promised in the 1891 agreement. But the rule as to interest against the United States does not allow us to adjudge interest as damages at all. Congress must expressly provide for it or the contract must so provide. The only contractual obligation here is for simple five per cent interest until payment.

Neither the statutes nor the treaties provided for interest on the deferred payments.

The parties never intended that the entire consideration should be paid for in cash. It would have been most unwise to have done so. The best interest of the Indians demanded that it be paid periodically. This is what the parties agreed upon and the payments should be credited in accordance with the agreement.

Under the 1833 treaty the United States agreed to pay $4,600 a year for 12 years in "goods", that is, food, clothing, etc. It would have been absurd to furnish all of the goods on the treaty date. Many things were to be furnished as needed; others, conditionally, and others in the discretion of the President. It was never intended that the entire consideration should be turned over when the treaty was signed.

All the decisions of this court under the Indian Claims Commission Act, until the *Miami* case and the *Crow* case, *supra*, have held that a tribe was not entitled to interest on its claim, unless the treaty or other agreement provided for it, or there had been a taking under the Fifth Amendment. *Choctaw Nation v. United States*, 91 Ct. Cl. 320, 402-403, *cert.* denied, 312 U.S. 695; *Northwestern Shoshone Indians v. United States*, 95 Ct. Cl. 642, 694; *Osage Nation v. United States*, 119 Ct. Cl. 592, 671, *cert.* denied 342 U.S. 896; *Kiowa, Comanche and Apache Tribes v. United States*, 143 Ct. Cl. 534, *cert.* denied 359 U.S. 934. What the Commission has done in this case, and what we did in *Miami Tribe of Oklahoma, supra*, was to allow the United States a credit only for an amount which, together with interest, would have amounted to the payments made over a period of years. This is contrary to all the decisions and must be overruled.

This leaves for consideration the credit to which the United States is entitled for the payments made on account of the perpetual annuity of $30,000 per year. A total of $2,910,000 had been paid on this account, apparently by the end of the fiscal year 1948, and payments of $30,000 a year have continued thereafter, and will continue *ad infinitum*, unless some alternate agreement is entered into in the future.

The Commission has not allowed defendant credit for the payments made, but for a sum which, if invested at 5 percent, would have earned $30,000 per year. We think this is correct.

In *Miami Tribe of Oklahoma v. United States*, 146 Ct. Cl. 421, we held the United States was not entitled to be credited with the annuity payments, and we also held it was not entitled to credit for the amount which, if invested at a certain rate of interest, would have yielded the amount of the annuity payments. We did not give it credit for the latter amount apparently for the reason that the annuity was not intended to be perpetual (page 472), and also because at a later date the annuity was commuted and the commuted value paid to the tribe (page 473).

But here there is no doubt that the United States agreed to pay the annuity in perpetuity. Nothing but the yearly payments have ever been paid or ever will be paid, so long as the treaty remains in force. In such case, it seems to us, the United States should be credited with that amount which, had it been paid to the tribe, could have been invested by it to yield the amount of the yearly payments required by the treaty. Although not paid to the tribe, there was a constructive payment by the United States to itself, as trustee for the tribe, in perpetuity. We think defendant is entitled to credit for this amount. Certainly, having paid over $3,000,000 on account of this perpetual annuity, defendant is entitled to credit for some amount. The amount allowed by the Commission seems to us just and proper.

The action of the Indian Claims Commission in respect to the perpetual annuity is affirmed.

When the Pawnee Reservation was laid out in 1859 a tract of 4,800 acres which should have been included in the reservation was omitted. When the error was discovered, the Indian Superintendent at Omaha wrote the Commissioner of Indian Affairs asking, "On behalf of said Pawnee Indians" that they be paid for these lands. Accordingly, the Congress in the Act of March 3, 1875 (18 Stat. 420, 448), appropriated $6,000 to pay for them. This sum was paid.

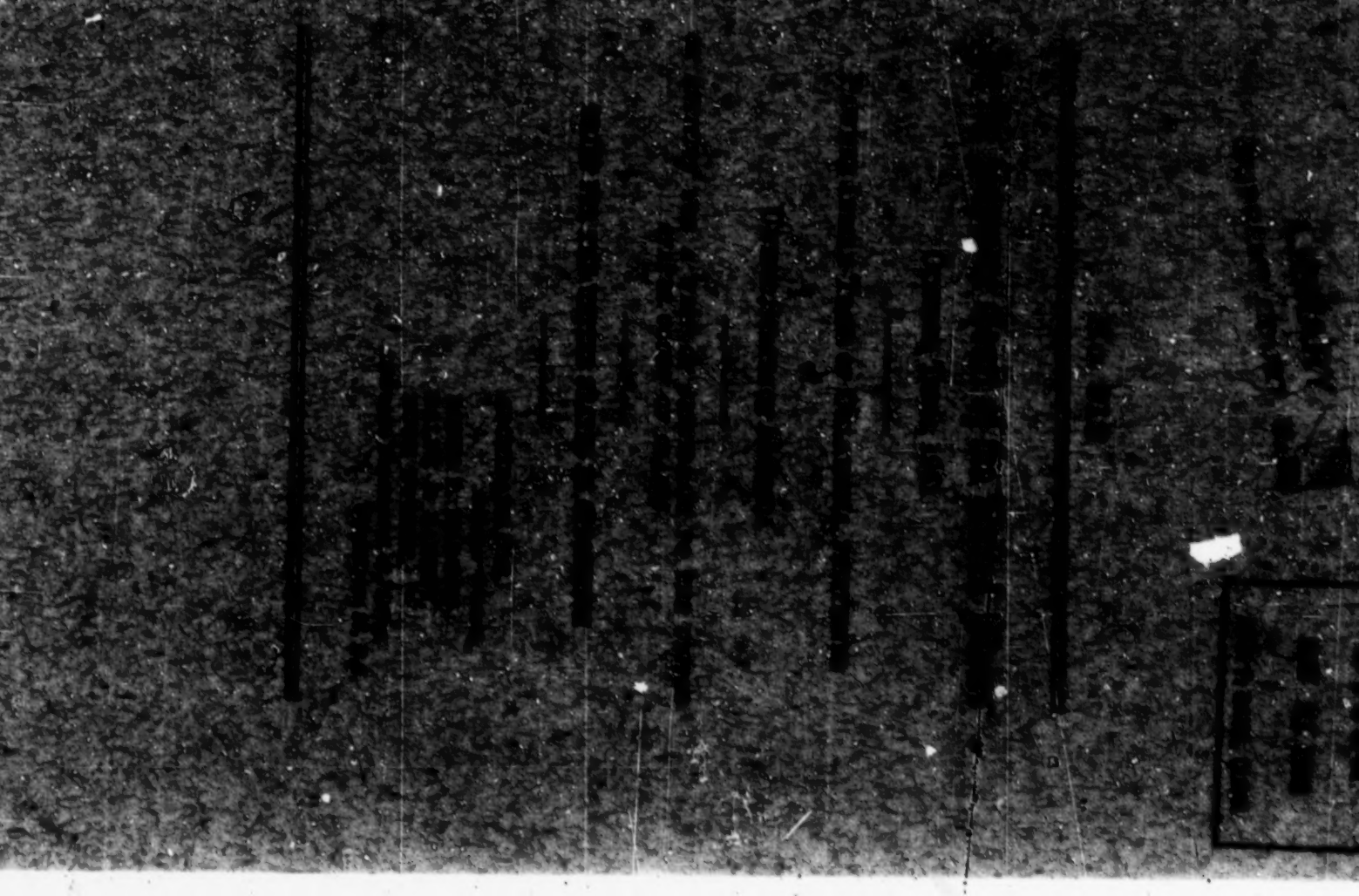
The United States thus acquired this acreage by purchase and not by condemnation and, hence, plaintiff is not entitled to interest.

The case is remanded to the Indian Claims Commission for further proceedings not inconsistent with this opinion.

It is so ordered.

DURFEE, *Judge;* LARAMORE, *Judge* and JONES, *Chief Judge*, concur.

BRIEF FOR THE U. S. IN OPPOSITION



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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 912

PAWNEE INDIAN TRIBE OF OKLAHOMA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Indian Claims Commission (Sep. App. 128, 176)[1] are reported at 9 Ind. Cl. Comm. 85 and 94. The opinion of the Court of Claims (Pet. App. 15) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered April 4, 1962 (Pet. App. 15). The petition for a writ of certiorari was filed on April 27, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1) and Section 20(e) of the Indian Claims Com-

[1] Citation is to the separate appendix filed by petitioner in the Court of Claims and presently on file with the Clerk of this Court.

mission Act of August 13, 1946, 60 Stat. 1049, 1054, 26 U.S.C. 70s(c).

QUESTIONS PRESENTED

1. Whether, in determining under the Indian Claims Commission Act the credits to be allowed the United States against amounts found to be due to an Indian Tribe for cession of its lands, the Court of Claims properly refused to discount at an annual rate of 5 percent payments actually made in installments in accordance with treaties of cession on the ground that such a discount would be contrary to the rule that the United States is not liable for the payment of interest.

2. Whether the method of valuation used by the Indian Claims Commission to value the Indian lands in this case conflicts with prior decisions of this Court or the Court of Claims.

STATUTE INVOLVED

Section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1050, 25 U.S.C. 70a, provides in part:

* * * * *

> In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145[2] of the Judicial Code * * *.

[2] Now covered by Sections 1491, 1496, 1501, 1503, and 2501 of Title 28.

STATEMENT

Petitioner filed claims before the Indian Claims Commission alleging that the consideration paid it for lands ceded to the United States under four treaties had been unconscionable and seeking additional consideration for each tract ceded. After a full hearing at which expert testimony was heard and documentary evidence received on land values, the Commission made voluminous findings of fact (Sep. App. 51–127) as to the value of each tract of land as of its cession date and the amount of the consideration paid by the United States under each treaty. In each instance the Commission found that the consideration paid was unconscionable and awarded petitioner a money judgment against the United States.

The Commission determined the value of the lands and the consideration actually paid for them to have been (Sep. App. 51, 86, 94–95, 118, 124, 191):

Treaty	*Acres ceded*	*Value*	*Consideration*
1833	13,074,000	$4,575,900	$148,200.00
1848	110,419	99,380	2,600.00
1857	9,878,000	4,939,000	1,544,281.20
1875	4,800	12,000	6,000.00

The Commission, however, did not give the United States credit for the actual consideration which was paid in installments. In compliance with the decision of the Court of Claims in *Crow Tribe of Indians v. United States*, 284 F. 2d 361, certiorari denied, 366 U.S. 924, the Commission discounted the installment payments at a capitalized interest rate of 5 percent back to the dates of the treaties, and by this process

reduced the amounts for which the government was to receive credit, as follows (Sep. App. 86, 118, 191):

Treaty	Actual payment	Discount value	Credit reduction
1833	$148,200.00	$115,095.73	$33,104.27
1857	1,544,281.20	745,795.81	798,485.39
			831,589.66

The 1857 treaty also provided for a perpetual annuity of $30,000. The Commission initially allowed the United States no credit whatsoever for the $2,910,000 it had paid annually through fiscal 1961 (Fdg. 139, Sep. App. 118). Thereafter, the government moved that the perpetual annuity be considered terminated upon payment by the United States of the judgment awarded by the Indian Claims Commission in the instant proceeding. In response to this motion the Commission modified its previous judgment, allowed a credit of $600,000 with respect to the annuity and denied the government's motion (Fdg. 139, Sep. App. 191).

Petitioner appealed from the final order of the Commission to the Court of Claims on both the questions of value and the credits to be allowed the government under the 1833 and 1857 treaties. The United States also appealed both issues, contending that the discount of the installment payments was error and that the evidence submitted by petitioner failed to support the Commission's valuation of the land.

The Court of Claims rejected the contentions of both parties as to value, stating that it had "* * * carefully considered the findings and opinion of the Commission * * * and we are fully satisfied that the

valuations arrived at by it are amply supported by substantial evidence" (Pet. App. 15).

With respect to the credits to be allowed for treaty payments, the Court of Claims explicitly overruled two previous decisions, *Crow Tribe of Indians* v. *United States*, *supra*, and *Miami Tribe of Oklahoma* v. *United States*, 281 F. 2d 202, certiorari denied, 366 U.S. 924, in which it had held for the first time that the amounts actually paid in installments were to be reduced by discounting them at 5 percent to the date of the treaty (Pet. App. 16). It determined that the United States was entitled to credit for the full amount paid, as determined by the Indian Claims Commission, although paid over a period of years (Pet. App. 17). With respect to the $30,000 perpetual annuity under the 1857 treaty, the Court of Claims affirmed the ruling of the Commission which had held that the government was entitled to a credit equal to the sum which, if invested at 5 percent, would have earned $30,000 per year, or $600,000 (Pet. App. 18–19).

ARGUMENT

In this case the Court of Claims overruled two recent, and we believe erroneous, decisions, *Crow Tribe of Indians* v. *United States*, *supra*, and *Miami Tribe of Oklahoma* v. *United States*, *supra*, in which it had held that, in determining the amounts to be

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The Court of Claims did not specifically mention a third case which reached the same result on this issue, *Absentee Shawnee Tribe of Oklahoma* v. *United States*, C. Cls. App. No. 9-59, decided without opinion, November 2, 1960, certiorari denied, 366 U.S. 924 (Pet. 16). Inasmuch as it was specifically decided on the authority of *Miami* and *Crow* (and on the same day as *Crow*), it necessarily falls when they fall.

credited to the United States against the consideration for the cession of Indian lands, sums actually paid in installments were to be discounted at 5 percent to the dates of the treaties. The court justified the use of the discount on the theory that the amounts actually received were of reduced value because paid in installments. These decisions were in sharp conflict with the well-established principle precluding the award of interest against the government. Their rejection here is consistent with the decisions of this Court in Indian and non-Indian cases and with cases previously decided by the Court of Claims. Accordingly, the decision below does not warrant further review.

1. It is a well-settled rule that the United States is not liable for the payment of interest in the absence of a constitutional taking or an agreement or statutory provision. *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588. This rule is as applicable to transactions involving Indians as it is to all others. *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49; *Choctaw Nation* v. *United States*, 91 C. Cls. 320, 402–403, certiorari denied, 312 U.S. 695; *Cherokee Nation* v. *United States*, 270 U.S. 476, 490. The rule has been applied to cases arising under the Indian Claims Commission Act, *Loyal Creek Indians* v. *United States*, 118 C. Cls. 373, 383, certiorari denied, 342 U.S. 813; *Western Cherokee Indians* v. *United States*, 116 C. Cls. 665, 678, certiorari denied, 340 U.S. 903; *Osage Nation of Indians* v. *United States*, 119 C. Cls. 592, 672. It has been specifically held that even where the government fails to make payments under the provisions of a treaty,

interest cannot be recovered.[1] *Northwestern Shoshone Indians* v. *United States*, 95 C. Cls. 642, 694, affirmed, 324 U.S. 335; *Cherokee Nation* v. *United States*, 270 U.S. 476, 490.

In three cases decided in 1960, *Crow Tribe of Indians* v. *United States*, *supra*, *Miami Tribe of Oklahoma* v. *United States*, *supra*, and *Absentee Shawnee Tribe of Oklahoma* v. *United States*, *supra*, the Court of Claims broke sharply with this rule. Under the compulsion of these decisions, the Indian Claims Commission, in the present case, discounted payments made by the United States over a period of years as required by treaty, to a "present worth" as of the date of the treaty. To illustrate, payments under the 1857 treaty extended over a period of 78 years and aggregated $1,344,281.20. The Commission discounted these payments at a 5 percent interest rate and credited the United States with their present worth as of the treaty date, or only $568,235.54 (Sep. App. 194, Fdg. 138).

On appeal, the Court of Claims (Pet. App. 17) explained the discount process as follows:

> * * * What the Commission has done in this case, and what we did in the cases referred to, was to credit the United States with a sum which, if put at interest at 5 percent, would have amounted, with interest, to the aggregate of the deferred payments. De-

[1] In the present case there was no failure to make the payments required by the several treaties, or even a delay in making such payments. All were promptly paid in accordance with their terms.

> fendant was credited with a sum less than it had paid, because it was assumed that, if this sum had been paid in cash and invested, it would have earned enough at 5 percent for the aggregate to equal the amount of the deferred payments.

Recognizing that this was simply a way of charging the United States for delay in payment beyond the treaty date, the Court of Claims concluded that its recent decisions accepting the process "were in error" (Pet. App. 16) and held (Pet. App. 17):

> It now seems evident to us that this is tantamount to charging the United States with interest—in face of the well established rule that the United States is not liable for interest, in the absence of a contractual or statutory requirement to pay interest.

During the last Term, the United States petitioned for, but this Court denied, writs of certiorari in the three cases which the Court of Claims has now overruled (Pet. App. 16). In each of those petitions, the question presented was substantially the same as the first question presented in this brief, *supra*, p. 2. The United States urged that the question was important because the Court of Claims had adopted a "novel rule" which would affect almost every claim pending under the Indian Claims Commission Act and which threatened to change the established course of the law governing interest against the United States. Now that the Court of Claims has overruled its former decisions and declared the correct rule to be as it always had been under *Cherokee Nation* v. *United States*, 270 U.S. 476, 490, and the other

cases cited *supra*, pp. 6–7, there is no longer a "novel rule" and therefore no necessity for review by this Court.

2. Petitioner also questions the method of valuing the land used by the Commission and affirmed by the Court of Claims (Pet. 3, 12–13).

(a) *Discount.* Petitioner contends (Pet. 12) that the decision below conflicts with *Miami Tribe of Oklahoma* v. *United States*, 146 C. Cls. 421, 175 F. Supp. 926, reaffirmed in *Miami Tribe of Oklahoma* v. *United States*, 281 F. 2d 202, certiorari denied, 366 U.S. 924. It reasons that by accepting the Commission's findings as to land value, the Court of Claims necessarily approved the Commission's theory of valuation "which theory discounted fair market value at cession dates at the then going interest rates for the time the lands remained unsold in the hands of the government" (Pet. 12). While it may be conceded that the Court of Claims indicated its disapproval of such a theory in the *Miami Tribe of Oklahoma* cases, 146 C. Cls. 421, 175 F. Supp. 926, the instant decision does not present a conflict for the reason that the Indian Claims Commission did not use the disapproved theory here. Petitioner's contention is without support in the

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It should be noted that the Commission did not use the "disapproved" theory of valuation in the *Miami Tribe of Oklahoma* case, as is clear from the Court of Claims opinion in that case (146 C. Cls. at 467, 175 F. Supp. at 952–953):

> * * * Although the Commission did not comment on two theories urged by the Government, i.e., the wholesale value of the land and the necessity of discounting any market value found in 1818 by 6% for the length of time the land remained unsold in the hands of the Government, the Commission appears to have rejected both theories.

record, either in the findings of the Commission cited in the petition (Pet. 12) or in the Commission's opinion. The record shows that as to each tract the Commission found its fair market value as of the date of cession without reduction for the period of time it remained unsold (Sep. App. 83, Fdg. 80 as to 1833 treaty; Sep. App. 94, Fdg. 107 as to 1848 treaty; Sep. App. 110, Fdg. 133 as to 1857 treaty; Sep. App. 124, Fdg. 157 as to the 1875 Purchase).

(b) *Statutory Value.* Petitioner also alleges a conflict with this Court's decision in *New York Indians* v. *United States*, 170 U.S. 1, as modified, 170 U.S. 614, because the Court of Claims failed "to apply the statutory sale price for public lands as value at cession dates when there were no comparable sales of similar lands in the same general area about the same time" (Pet. 12). In that case the United States, in exchange for certain lands near Green Bay, Wisconsin, agreed, among other things, to set aside a tract of land west of the Mississippi River upon which the Indians were to remove. When the Indians failed to remove, the United States sold, or otherwise disposed of, the reserved lands for its own benefit. In holding that the Indians were entitled to recovery for the loss of their lands, the Court accepted the statutory price at which they had been sold by the United States as the measure of the recovery. The case, however, is distinguished by its special facts and presents no conflict with the instant decision. The use of the statutory price as a measure of value in *New York Indians* was justified by the unique circumstance

that there was no market for the land nor evidence upon which a market value could be predicated. See *Miami Tribe of Oklahoma* v. *United States*, 146 C. Cls. 421, 450–452, 175 F. Supp. 926. In the present case there was voluminous evidence as to the fair market value of the land, evidence introduced by both the petitioner and the government. Thus, there was no necessity or justification for the Commission to rely on the statutory price for public land.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1962.